Supreme Court, U.S.
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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2004

ROBERT FRANCIS,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the protections of the Sixth Amendment extend to sentencing under the Guidelines of the United States Sentencing Commission?

2. What, if any, legal standard applies to review of orders granting the Government's Motion to Disqualify Defendant's Counsel of Choice?

LIST OF ALL PARTIES

United States of America

Robert Francis

Germaine Davis, also known as Gary Henderson

Anthony Francis

Leo Muhammed

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, ROBERT FRANCIS, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on May 12, 2004.

I. OPINION BELOW

The published opinion of the United States Court of Appeals for the Eighth Circuit in United States v. Robert Francis, No. 02-3467 (8th Cir. 2002) was filed on May 12, 2004 and is reported at 367 F.3d 805 (8th Cir. 2004). That Opinion affirmed Mr. Francis' conviction for conspiring with others to distribute cocaine, in violation of 21 U.S.C. §§ 841(a) and 846. A copy of the Opinion is included in the Appendix to this Petition. Mr. Francis' petition to the Eighth Circuit for rehearing was denied on June 10, 2004. A copy of the Order denying the Petition for Rehearing is also included in the Appendix to this Opinion.

II. JURISDICTION

A. The jurisdiction of the United States District Court for the Eastern District of Missouri was invoked under Title 18 U.S.C. § 3231 for a violation of 21 U.S.C. §§ 841 and 846.

B. The jurisdiction of the United States Court of Appeals for the Eighth Circuit was founded on Title 28 U.S.C. § 1291 and Title 18 U.S.C. § 3742(a) and was based on the following particulars:

   i) Date if entry of judgement sought to be reviewed: October 3, 2002

   ii) Filing date of motion for trial:N/A

   iii) Disposition of motion for new trial: N/A

   iii) Filing date of Notice of Appeal: October 8,2002

C. The opinion of the United States Court of Appeals for the Eighth Circuit was filed on May 12, 2004. On June 20, 2004, the Court of Appeals denied Mr. Francis' Petition for rehearing. The Court of Appeals' mandate issued August 15, 2001. This Court's jurisdiction is invoked under 28 U.S.C.§ 1254(1)

III. CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

A. The Sixth Amendment to the Constitution of the United States.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

B. Guidelines of the United States Sentencing Commission and specifically:

i. Guideline § 2D1.1(a)(3): Base Offense Level

The offense level specified in the drug quantity set forth in subsection c, except that if he defendant receives an adjustment under §3B1.2 (mitigating role), the base offense level under this subsection shall not be more than Level 30.

ii. Guideline § 3B1.1: Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

a. If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by **4** levels.

iii. Guideline § 2D1.1(b)(1) which provides "if a dangerous weapon (including a firearm) was possessed, increase by **2** levels."

IV. STATEMENT OF THE CASE

Petitioner, Robert Francis, was indicted in the United States District Court for the Eastern District of Missouri for conspiring with others to distribute cocaine, in violation of 21 U.S.C. §§ 841(a) and 846. The jurisdiction of the United States District Court for the Eastern District of Missouri was invoked under Title 18 U.S.C. § 3231.

On February 7, 2002, four days before trial was scheduled to begin, the government moved for an inquiry into a possible conflict of interest between Petitioner and his retained counsel. A hearing was held at which one of the government's witnesses testified that she had sex in exchange for money with Petitioner's attorney and had seen Petitioner's attorney use cocaine. The district court credited the government's testimony, and at the government's motion, disqualified Petitioner's counsel, finding an actual conflict of interest.

Petitioner obtained substitute counsel in the proceedings, and the trial commenced on May 1, 2002. On May 24, 2002, the jury returned a partial verdict. Three defendants were found not guilty. Petitioner and another defendant were found guilty.

By "extrapolation" of estimates, (*United States v. Francis et. al,* 367 F.3d 804, 821(8th Cir 2004), (App. p.21) the presentence report concluded that Mr. Francis was responsible for over 150 kilograms of cocaine. Also, the presentence report concluded that Mr. Francis was a leader or organizer of the conspiracy under U.S.S.G. § 3B1.1, and also that Mr. Francis had possessed a dangerous weapon.

Mr. Francis objected. He argued that he should have had an *Apprendi*-type hearing, "a quasi *Apprendi* type of argument...if you will, almost as a special finding the amounts of drugs attributable to our client... The sentencing is unconstitutional as it pertains to the Guideline range that my client is looking at, which is a mandatory life sentence." Tr. Sentencing Hearing, p. 9, *United States v. Robert Francis, et. al.* No. 4:00-CR-547 (D.C. Mo., E.D., (2002)

Under U.S.S.G. § 2D1.1(3), the base offense level for offenses involving at least 5 kilograms of cocaine is Level 32. The Presentence Report assigned a base offense level applicable to offenses involving 150 kilograms or more of cocaine; offense level of 38. To this base offense level the Report added another 4 levels for Mr. Francis' role in the offense and another 2 levels for possessing a firearm, thus mandating a life sentence for Mr. Francis.

The District Court overruled Mr. Francis' objections and adopted the Presentence Report "as my findings of fact in this case." *Id* p. 68 The court sentenced Mr. Francis to the "mandatory life imprisonment called for by the sentencing guidelines since that is the guidelines range." *Id.* p.75.

The United Court of Appeals for the Eighth Circuit affirmed both the conviction and the sentence. With respect to disqualifying Mr. Francis' attorney, the Court of Appeals held that the district court did not abuse its discretion in rejecting Mr. Francis' waiver of the potential conflict between himself and his attorney.

The Court of Appeals rejected Mr. Francis' Sixth Amendment argument, noting it "has specifically rejected the assertion that the jury must make a guideline quantity finding..." *United States v. Francis,* et. Al,. 367 F.3d at 820, App. p.19 The Court of Appeals also concluded that the district court properly applied the sentencing enhancements. *Francis,* 367 F.3d. at 824, 825, App. pp. 27,32

V. REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. Certiorari should be granted to determine whether the Sixth Amendment applies to the Guidelines of the United States Sentencing Commission and to resolve a split in the circuits.

In the trial court and on appeal, Mr. Francis argued that increasing his sentence based on relevant conduct was unconstitutional. He argued "that

the *Apprendi* rule applies not only to statutory sentences, but also to the Guidelines of the United States Sentencing Commission". (Reply Brief of Robert Francis, p. 21, *United States v. Francis,* No. 02-3467 (8th Cir. 2002). He argued that basing his sentence on relevant conduct, his role in the offense, and the presence of a firearm, violated the *Apprendi* principle. *Apprendi v. New Jersey,* 530 U.S. 466 (2000). Mr. Francis was "unable to discern a rational basis for not applying the Fifth and Sixth Amendments to cases where the sentence is based on a statute and cases where a sentence is based on that sentencing guidelines. Both are equally the creations of congress and require findings of fact that mandate the Defendant's sentence." (Reply brief of Defendant-Appellant Robert Francis, p. 21, *United States v. Robert Francis,* No. 02-3467, 8th Cir. 2004).

The United States Court of Appeals for the Eighth Circuit rejected Mr. Francis' argument.

> "Robert Francis contends that his sentence violated Apprendi because the indictment did not allege, and the jury was not instructed that it must find, that the offense involved in excess of 150 kilgrams of cocaine."
>
> United States v. Robert Francis, et. al., 367 F.3d at 820, App. p. 19

The Eighth Circuit stated that it "has specifically rejected the assertion that the jury must make a guideline quantity finding." *Francis,* 367 F.3d at 820, App. p.19, citing *United States v. Miller,* 295 F.3d 824, 827 (8th Cir. 2002).

Mr. Francis also argued that increasing his sentence for possessing a firearm and for being a leader or organizer of a conspiracy was *Apprendi*-barred. "He was not charged under any federal statute related to possessing firearms, and the jury made no findings on that issue. Similarly, Appellant should not have been a leader or organizer of a conspiracy. Again, he was not so charged and the jury did not so find." (Reply Brief, p. 22).

The Court of Appeals for the Eighth Circuit rejected these arguments as well. The Court of Appeals concluded "the district court properly applied the 4-level increase in Robert Francis' offense level for his role in the offense under § 3B1.1(a)." *Francis*, 367 F.3d at 824, App. p.27 The Court of Appeals also concluded that the district court did not abuse its discretion in increasing Mr. Francis' sentence for possessing a firearm. *Francis,* 367 F.3d at 826, App. p.32

The facts found by the jury entitled the government to request a maximum sentence of about 22 years. However, the facts found by the judge, as set forth in the presentence report, mandated a life in prison for Mr. Francis.

Shortly after this Court announced its decision in *Blakely v. Washington* ,___ U.S. ___, 124 S.Ct. 2531, 159 L.Ed. 403 (2004), the Seventh Circuit considered a challenge to a federal guideline sentence based on matters not submitted to a jury. The Seventh Circuit concluded that the Guidelines of the United States Sentencing Commission and the Washington State Sentencing Provisions considered in *Blakely* were virtually identical.

> The pattern is the same as that in the Washington statute, and it is hard to believe that the fact that the Guidelines are promulgated by the United States Sentencing Commission, rather than by a legislature, can make a difference. The Commission is exercising a power delegated to it by Congress and the legislature cannot evade what the Supreme Court deems the commands of the Constitution by a multi-stage sentencing scheme. Neither, it seems plain, can a regulatory agency.

United States v. Booker, No. 03-4225 (7th Cir. 2004), Slip Opinion, pp. 3,4.

Like Mr. Francis and the Seventh Circuit, the four dissenting justices in *Blakely* are unable to identify a meaningful difference between the Washington sentencing system and the Guidelines of the United States Sentencing Commission. *Certiorari* should be granted to reconcile the holdings of the Seventh and Eighth Circuits and to determine whether the protections of the Sixth Amendment extend to the Guidelines of the United States Sentencing Commission.

B. *Certiorari* should be granted to identify a standard by which an appellate court should review a ruling on the government's motion to dismiss a defendant's counsel of choice.

On appeal, Mr. Francis argued that the district court erred in rejecting his waiver of the potential conflict between himself and his attorney. Citing *Wheat v. United States,* 486 U.S. 153 (1988), the

Court of Appeals concluded that the district court had broad discretion in making its disqualification decision. *United States v. Robert Francis,* Slip Opinion, p. 31.). *Wheat* was unclear about the standard of review for disqualification orders. "Although never explicitly endorsing a standard for appellate review, the court appears to limit such review to determining whether an abuse of discretion has occurred." *Wheat,* 486 U. S. 153, 171, (Marshall J. dissenting). The Court of Appeals concluded that the district court did not abuse its discretion in rejecting Mr. Francis' waiver of a conflict between himself and his attorney. *Francis,* 367 F.3d at 831, App. p.43

Other circuits have used a more thorough approach when reviewing an order dismissing, at the government's request, a defendant's counsel of choice. The Tenth Circuit, unlike the Eighth, considers the law. The Tenth Circuit reviews disqualification under a two-part test. First, the district court's fact determinations are reviewed for clear error. "Second, we review the district court's interpretation of a legal norms under a *de novo* standard when that interpretation implicates important constitutional rights." *United States v. Bolden*, 353 F.3d. 870, 878 (10th Cir. 1980)

Here, the motion to disqualify came from the government, not from Mr. Francis or any of his co-defendants. Mr. Francis could have waived his right to counsel in its entirety, and the government would not even have standing to object. If such a waiver is knowing and voluntary, it is honored. Only when a defendant seeks to keep the counsel of his choice is the government allowed to become so paternalistic. As a result, it is more difficult to forego a portion of

a lawyer's services than it is to dispense with such services in their entirety. Petitioner can offer no reasonable explanation for this difference.

Had Mr. Francis chosen to proceed *pro se*, his choice to waive counsel in its entirety would have been reviewed only to determine whether the choice was knowing and voluntary. *See e.g., United States v. Pfeiffer,* 371 F.3d 430 (8th Cir. 2004). Had that standard of review been applied to Mr. Francis' partial waiver, the district court would have been overturned.

Certiorari should be granted to assert that waivers of conflicts are to be judged by the same standards as all other waivers of constitutional rights. With a knowing and voluntary waiver, and in the absence of a compelling government interest, a government's motion to disqualify should be denied.

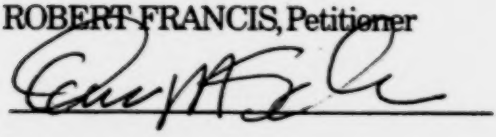
VI. CONCLUSION

For the foregoing reasons, *Certiorari* should be granted to determine:

A. Whether the protections of the Sixth Amendment extend to the Guidelines of the United States Sentencing Commission;
B. To determine whether any legal standard applies to review of orders on the government's motion to disqualify a defendant's counsel of choice; and
C. To resolve a split in the circuits on both of these issues.

Respectfully submitted,

ROBERT FRANCIS, Petitioner

By: 

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